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See concurring opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAVIER PIMENTEL, Defendant and Appellant.	E075653 (Super.Ct.No. CR42853) OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Defendant and appellant, Javier Pimentel, filed a petition for resentencing pursuant to Penal Code section 1170.95,[1] which the trial court denied. After defendant filed a notice of appeal, this court appointed counsel to represent defendant.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the facts, a statement of the case, and identifying one potentially arguable issue: whether the trial court erred in denying defendant's petition without receiving briefing on the issue of defendant's entitlement to relief. Defendant was offered the opportunity to file a personal supplemental brief, which he has done. Defendant appears to contend that the jury had been deadlocked and that all records reflecting the deadlock are missing or have been removed from the record on appeal. In his supplemental brief, he additionally argues that he has already served time on his three prior prion term enhancements, and he should be resentenced "'under the new laws.'" We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

"Defendant and the victim had been involved in a fight a few days before the killing, with blows struck and words exchanged; this altercation involved the death of a mutual acquaintance . . . although none of the witnesses was able to provide a clear explanation of the basis of the quarrel." (*Pimentel I*, *supra*, E012127.)

"On the night of the killing, the victim's wife . . . was at home with her husband when there came a knock on the door. [The victim] opened the door halfway; defendant was standing there, looking angry, and demanded that [the victim] come outside.

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[2] On our own motion, we take judicial notice of the nonpublished opinion in *People v. Pimentel* (Feb. 24, 1994, E012127) (*Pimentel I*) from the record in defendant's appeal from the original judgment. (Evid. Code, § 459.) We derive most of our factual recitation from the opinion.

Defendant, looking 'like he was breathing fire out of his nose,' pushed his way inside, but was repulsed and the door was locked. [The victim's wife] looked out a window and saw several men outside, armed with handguns. She went to a back bedroom and shortly [after] heard glass breaking and the door being smashed. She heard a shot, heard her husband say, 'No,' and [then] another shot. [The victim's wife] returned to the living room, where she found defendant (and no one else) standing over [the victim's] body. Defendant kicked [the victim] in the head, saying, 'You fucked up.' [The victim's wife] saw the handle of a handgun protruding from defendant's waistband. Defendant was wearing boots." (*Pimentel I*, *supra*, E012127.)

"The victim . . . was shot probably three, perhaps four, times. The trajectory of two bullets—one entering the top of the back of the head and exiting near the base of the skull, the second entering the shoulder and winding up against the ribs—was consistent with his having been shot by someone standing above him as he crouched or fell. The pathologist believed that one bullet went through [the victim's] arm as he apparently tried to shield his head, and then entered the skull. The two wounds to the body would have been immediately fatal, while the head wound would have proved fatal if medical care were not provided. Two bullets were recovered from the victim's body, and three more were found in the apartment where the killing took place, one having penetrated the door. Of the five, four were identified as .22-caliber, while the fourth (which came from the victim's body) was more badly damaged and could have been either a .22- or .25-caliber bullet. All five bullets were of the same general type—jacketed, with hollow points. At

least three of the bullets appeared to have been fired from the same gun; the other two were too badly damaged to tell." (*Pimentel I, supra*, E012127.)

"When defendant was taken into custody, he had a wound on his left hand which appeared to be a gunshot wound, and which could have been inflicted by a shot fired from a gun held in his right hand. He was also wearing boots, which had a sole pattern consistent with a muddy boot print on the broken-in door of [the victim's] apartment." (*Pimentel I, supra*, E012127.)

The jury convicted defendant of first degree murder (§ 187), burglary (§ 459), and being an ex-felon in possession of a firearm (§ 12021). "The jury was unable to reach agreement with respect to allegations that defendant personally used a firearm (§ 12022.5), personally inflicted great bodily harm (§ 12022.7), and fell within the provisions of the habitual criminal statute. (§ 667.7, subd. (a)(1).)" (*Pimentel I, supra*, E012127.) Additionally, three prior serious felony allegations (§ 667) and two prior prison terms (§ 667.5, subd. (b)) had either been found true or were admitted.[3] On December 17, 1992, the trial court sentenced defendant to an aggregate, indeterminate term of 45 years to life.

On appeal, this court affirmed the judgment by opinion dated February 24, 1994. (*Pimentel I, supra*, E012127.) In our opinion, this court noted: "The jury was instructed on aider and abettor liability and could have based its verdict on the belief that defendant, even if not the shooter, instigated the confrontation with [the victim] and encouraged or

[3] The record does not reflect whether or how the allegations were found true or if defendant admitted them.

facilitated his killing by such acts as demanding that [the victim] come outside, or kicking the door down." (*Ibid*.) This court further observed that the victim's wife's "testimony was circumstantial insofar as it was presented to support the People's contention that defendant committed the actual shooting." (*Ibid*.) She "provided substantial direct evidence that defendant knowingly participated in a plan to kill" the victim. (*Ibid*.) Her testimony "was not reasonably consistent with any explanation other than that defendant, himself armed, accompanied a group of armed men to [the victim's] apartment with the intent to inflict at least serious physical harm on him." (*Ibid*.)

This court noted: "The [trial] court gave CALJIC 3.01, which defines aiding and abetting as a knowing act to facilitate or encourage 'a crime' when the actor knows 'the unlawful purpose of the perpetrator.' However, for reasons not clear, the court did not give CALJIC 3.02, which goes on to explain that the actor need not intend to facilitate or encourage the specific crime committed . . . . Thus, the jury was left with the impression—favorable to defendant—that he could be convicted as an aider or abettor only if he intended to aid in a killing." (*Pimentel I*, *supra*, E012127.)

On February 22, 2019, defendant filed a form petition for resentencing pursuant to section 1170.95, alleging he was not the actual killer, did not aid or abet a killing with intent to kill, and was not a major participant acting with reckless indifference to human life during the course of the killing. The People filed a response contending section 1170.95 was unconstitutional. Defense counsel filed a reply arguing section 1170.95 was constitutional.

After several continuances, the trial court held a hearing on the petition on July 17, 2020. The People noted: "I previously sent the appellate record including all the jury instructions and appellate opinion to [defense counsel]. There are no instructions on natural and probable consequences or felony murder. [Defendant] was prosecuted for deliberate and premediated murder, and the [Court of Appeal] thereafter found sufficient evidence to support that the defendant was the actual killer."

Defense counsel responded: "I believe that the evidence shows that [defendant] was either the actual killer or was prosecuted as a direct aider and abettor." The court inquired: "Both of which would preclude" section 1170.95 relief?" Defense counsel answered: "Correct. So I submit and object for the record." The trial court then summarily denied the petition.

II. DISCUSSION

Defendant appears to contend that the jury had been deadlocked and that all records reflecting the deadlock are missing or have been removed from the record on appeal. Assuming arguendo that defendant's assertion is true, he fails to show how this is relevant to the court's ruling on his section 1170.95 petition. Regardless, defendant forfeited any argument with respect to any missing documents by failing to raise it in his first appeal. "California law prohibits a direct attack upon a conviction in a second appeal after . . . posttrial procedures . . . ." (*People v. Senior* (1995) 33 Cal.App.4th 531, 535; see *id*. at p. 538 ["[W]here a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay."]; see also *In re Harris* (1993) 5 Cal.4th 813, 829

["Proper appellate procedure thus demands that, absent strong justification, issues that could be raised on appeal must initially be so presented . . . ."].)

In defendant's supplemental brief, he additionally argues that he has already served time on his three prior prison term enhancements, and he should be resentenced "'under the new laws.'" "Effective January 1, 2020, the one-year enhancement in Penal Code section 667.5, subdivision (b) applies only if the defendant's prior prison term was 'for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code.' [Citation.] The amendment applies retroactively to defendants whose judgments are not yet final." (*People v. Herrera* (2020) 52 Cal.App.5th 982, 995, review granted Oct. 14, 2020, S264339.) Assuming arguendo that defendant's prior prison term enhancements were not derived from convictions for sexually violent offenses, defendant would not be entitled to relief because his judgment has long since been final. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error and find no arguable issues.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

I concur:

CODRINGTON
J.

[*P. v. Pimentel*, E075653]

MENETREZ, J., Concurring.

I concur in the majority opinion except for the last sentence of the Discussion. The appellate review procedures under *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *Anders v. California* (1967) 386 U.S. 738 (*Anders*), in which we read the entire record ourselves to search for arguable grounds for reversal, apply "only to a defendant's first appeal as of right." (*People v. Thurman* (2007) 157 Cal.App.4th 36, 45; *People v. Serrano* (2012) 211 Cal.App.4th 496, 498; *People v. Cole* (2020) 52 Cal.App.5th 1023, 1032 (*Cole*).) Because this appeal concerns a postjudgment proceeding in which there is no constitutional right to effective assistance of counsel, there is no right to *Wende*/*Anders* review. Appellant's counsel filed a brief raising no issues. Appellant was notified and filed a personal supplemental brief. We should address the issues raised in the supplemental brief but should not read the entire record ourselves to look for arguable grounds for reversal. (*Cole*, *supra*, at pp. 1039-1040.)

MENETREZ

J.